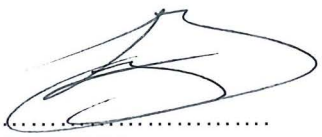
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2020/41972

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**



L.J. DU BRUYN **22 SEPTEMBER 2021**

In the matter between:

SLABBERT, GIDEON STEPHANUS Excipient / Defendant

and

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD First Respondent / First Plaintiff

SASFIN BANK LIMITED Second Respondent / Second Plaintiff

JUDGMENT

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[1] This is an opposed exception under rule 23(1). The Excipient is referred to as Mr Slabbert, the First Respondent is referred to as SASP and the Second Respondent is referred to as Sasfin.

The particulars of claim in the action

[2] The litigation between the parties that is relevant to the exception started with an action (**"the action"**) instituted by SASP and Sasfin against Mr Slabbert under the above case number. SASP and Sasfin are respectively the First Plaintiff and the Second Plaintiff in the action.

[3] SASP and Sasfin allege *inter alia* as follows in their particulars of claim (**"the particulars of claim"**) in the action:

> "THE RENTAL AGREEMENT
>
> ***Deal number R000142992***
>
> 4. On or about 31 October 2018, and at Waverley, Johannesburg, Sasfin and [Mr Slabbert], Sasfin being represented by a duly authorised person and [Mr Slabbert] representing himself, concluded a written rental agreement (***'the rental agreement'***), a copy whereof is annexed hereto marked **'A'**, the terms thereof to be incorporated herein by reference.
>
> 5. [Mr Slabbert] would pay rentals to Sasfin of R10 700.00 plus VAT per month, commencing on the commencement date as defined in the rental agreement and thereafter on the same day of each succeeding month.
>
> 6. The equipment was duly delivered to [Mr Slabbert] on or about 31 October 2018.
>
> 7. The addendum to the rental agreement does not record the correct agreement between the parties, in that the hirer is described as Sunlyn (Pty) Ltd.
>
> 8. The hirer should have been recorded as Sasfin Bank Limited and not Sunlyn (Pty) Ltd.
>
> ...
>
> TERMS AND CONDITIONS
>
> 11. The material terms of the rental agreement are the following:
>
> 11.1 Sasfin would rent to [Mr Slabbert], and [Mr Slabbert] would hire, the goods as described in the schedule to the rental agreement ('the equipment') for a minimum period of 60 months.
>
> 11.2 The rental agreements would commence on the date of last signature of the rental agreements.
>
> 11.3 The rentals payable in terms of the rental agreement would escalate by 15% per annum.
>
> 11.4 In the event of [Mr Slabbert] failing to make any payment due in terms of the rental agreement on due date thereof, [he] shall be deemed to have breached the provisions thereof, whereupon Sasfin would be entitled *inter alia* forthwith to claim immediate payment of all amounts which would have been payable in terms of the rental agreement until expiry of the rental period stated in the in the schedule, whether such amounts are then due for payment or not.
>
> 11.5 [Mr Slabbert] selected as [his] *domicilium citandi et executandi* for all purposes under the rental agreement the address referred to above.

11.6 A certificate signed by any manager of Sunlyn/Outsource or other authorised person, certifying the amount due by [Mr Slabbert] will on the face of it, be proof of the amount of [Mr Slabbert's] indebtedness, it shall not be necessary to prove the appointment of the person signing the certificate.

11.7 [Mr Slabbert] would pay to Sasfin interest at the prime rate (as defined) plus 6% on all amounts overdue in terms of the rental agreement.

11.8 [Mr Slabbert] would bear the Sasfin's legal expenses including attorney and own client costs incurred in recovering any amounts in terms of the rental agreement.

11.9 Sasfin would without notice to [Mr Slabbert] be entitled to cede all or any of its rights under the rental agreement, and/or its rights of ownership in the equipment, and if such cession took place, [Mr Slabbert] would thereupon if so required by any cessionary, make all payments directly to such cessionary, and, unless the context otherwise indicated, any reference to Sasfin in the rental agreement would be deemed to include a reference to its cessionary.

THE CESSIONS

Sasfin to SASP: The sale agreement

12. On or about 18 June 2019 and at Sandton the SASP and Sasfin, both parties represented by duly authorised persons, concluded a written 'Sale and Transfer Agreement', annexed hereto as annexures **'B'** (***'the sale agreement'***).

13. The material terms of the sale agreement are the following:

13.1 Sasfin agreed to cede or sell to SASP the rights title and interest in and to each of the specified equipment leases as defined, which definition includes agreements such as this rental agreement;

13.2 To give effect to the cession SASP agreed to pay a consideration for the rental agreement on the effective date.

13.3 Sasfin duly deliver to SASP all documents relating to, and all agreements recording the specified equipment leases on or before the effective date.

PERFORMANCE IN TERMS OF CESSIONS

Sasfin to SASP

14. In accordance with and pursuant to the terms of the sale agreement, Sasfin offered for cession to SASP the rental agreement referred to above.

15. SASP duly accepted the offer presented by Sasfin referred to by having made payment to Sasfin of the agreed purchase price and all conditions (to the extent applicable) were duly met on or about 18 June 2019.

16. Sasfin furthermore delivered to SASP all of the required documents in respect of the rental agreement referred above.

17. Accordingly, SASP duly acquired, through cession all the rights title and interest in the rental agreement referred above including the ownership of the goods forming the subject matter of the relevant agreement.

THE AMOUNTS DUE BY [MR SLABBERT]

18. [Mr Slabbert] breached the terms and conditions of the rental agreement in that he failed to maintain regular monthly payments.

19. The failure to continue to have maintained the monthly agreed upon instalments constituted a breach of the rental agreement which breach entitled SASP to claim immediate payment of all amounts which would have been payable in terms of the rental agreement until expiry of the rental period stated in the in the schedule, whether such amounts are then due for payment or not.

20. As at 15 October 2020 the outstanding balance in respect of the rental agreement calculated to an amount of R785 939.32 and in confirmation of such amount, a certificate of balance is issued by SASP and annexed hereto as **'C'**.

21. The prime rate as defined in the rental agreement as at date of due payment, being 15 October 2020, was 7.00% per annum.

22. In the premises [Mr Slabbert] is indebted to SASP in the amount of R785 939.32 together with interest thereon at the rate of 13.00% (prime plus 6%) per annum from 16 October 2020 to date of final payment.

NATIONAL CREDIT ACT

23. The provisions of the National Credit Act, Act 34 of 2005 ('the Act') are not applicable to the rental agreement and / or [Mr Slabbert] as:

    23.1 Ownership in and to the underlying equipment did not pass to [Mr Slabbert] neither did ownership pass upon the satisfaction of a specific condition or upon expiry of the rental agreement. As such the rental agreement is not a credit agreement as envisaged in terms of section 8(1) and more particularly section 8(4) of the Act.

[SASP's AND SASFIN's] ALTERNATIVE CLAIMS

24. SASP claims judgment against [Mr Slabbert] for payment of the amount of R785 939.32, on the basis of the aforesaid allegations.

25. Sasfin claims judgment against [Mr Slabbert] for payment of the amount of R785 939.32, in the alternative to the claim by SASP, in the event that the allegations regarding the cession between Sasfin and SASP above are not proved."

The rental agreement

[4] As alleged at paragraph 4 of the particulars of claim, a copy of a written rental agreement (**"the rental agreement"**) is attached thereto as annexure "A". The terms of the rental agreement are incorporated into the particulars of claim by reference at paragraph 4 of the particulars of claim. Counsel for Mr Slabbert argued his client's case at the hearing of the exception with reference to the rental agreement.

[5] The rental agreement refers to Sasfin as *"us"*, *"we"*, *"hirer"* or *"our"* and to Mr Slabbert as *"you"*, *"your"* or *"user"*. It provides *inter alia* as follows:

"1. … We agree to grant you the use of the goods described in the Schedule(s) hereto for the initial rental period stated therein on the terms and conditions set out in this Agreement and in the Schedule(s) thereto, subject to 2 below.

2. The initial rental period of the Agreement is the period stated in the Schedule thereto commencing from the date of last signature hereto ('the Commencement Date'). After the initial rental period the Agreement shall run indefinitely until either of us gives the other thirty days written notice of termination.

3. You and we both agree that the rights in the Agreement and in the ownership of the goods is held, and remains with us, or anyone we have transferred our rights to and that nothing in the Agreement shall be taken to mean that ownership may pass to you …

…

5. You and we both agree that the amount of the rentals will increase from time to time in accordance with increases in the prime overdraft rate as charged by The Standard Bank of South Africa Limited to its most favored customers ('prime'). In addition, you agree that the prevailing rental will increase once per year on the anniversary of the contract start date by the annual escalation percentage stated in the Schedule, cumulatively.

…

7. If you breach any of the conditions or terms of the Agreement, or fail to pay any amounts due to us ... then you agree that we have the right (without notice to you and without affecting any of our other rights) to:

   7.1 claim immediate payment of all amounts which would have been payable in terms of the Agreement until expiry of the rental period stated in the Schedule, whether such amounts are then due for payment or not. ... ; or

   7.2 immediately terminate the Agreement, recover possession of the goods, retain all amounts already paid by you and claim all outstanding rentals, all legal costs as between attorney and his own client and the Net Present Value at Prime of the rentals which would have been payable had the Agreement continued until expiry of the initial rental period stated in the Schedule as a pre-estimate of the damages which we may suffer.

8. If we grant you an extension of time in order to pay, or any other indulgence, this does not mean that we have given up any of our rights in the Agreement. You agree that we are entitled to charge interest on overdue amounts, including damages, at a rate of six percent per annum over prime.

...

11. You agree to pay all Rentals in terms of this Agreement in advance, every month, without the necessity of us having to send you a monthly statement or invoice. Paying on time is an essential condition of the Agreement and you agree that your signature to the Agreement gives us authority to draw against your bank account, wherever it may be, the amounts due to us in terms of the Agreement. ...

12. ... Upon cancellation or termination of the Agreement you agree, at your expense, to return the goods to us in good condition.

13. ... We may, without notice to you, transfer all or any portion of our rights in terms of the Agreement or our ownership of the goods to any other person or persons. You agree that, if we transfer, you will hold the goods and continue to fulfil your obligations to the new owners of the rights to the Agreement and/or the goods.

14. The first rental will become due on the commencement date and thereafter rentals will become due on the common due date of every succeeding month. ..."

[6] The goods rented by Mr Slabbert in terms of the rental agreement are described in a schedule as *"1 X 7100 SAMSUNG PABX"*, *"1 X SAMSUNG MF A4 COLOUR SL-C3060 COPIER"* and *"1 X SAMSUNG MF A3 COLOUR SL-4300 COPIER"*.

The exception

[7] Mr Slabbert filed a notice of exception (**"the notice of exception"**) to the particulars of claim. Four grounds upon which the exception is founded are stated in the notice of exception:

"[MR SLABBERT'S] FIRST EXCEPTION

3. [The] particulars of claim is bad in law, in that:-

   3.1 On or about 18 June 2019, Sasfin sold and ceded all its rights, title and interest in the rental agreement to SASP.

   3.2 Through the cession Sasfin was divested of its rights against [Mr Slabbert].

   3.3 Through the cession Sasfin's *locus standi* got destroyed.

[MR SLABBERT'S] SECOND EXCEPTION

4. [SASP's and Sasfin's] averment that the provisions of the [National Credit Act 34 of 2005] are not applicable to the rental agreement and/or [Mr Slabbert] is bad in law, in that:-

   4.1 The equipment rented to [Mr Slabbert], is movable.

   4.2 In terms of the rental agreement Sasfin undertook to supply the equipment, deferred [Mr Slabbert's] obligation to pay in terms of the agreement, charged interest in respect of the deferred amounts and the amounts not paid within the time provided for in the agreement, and in the event of non-payment Sasfin would be entitled to legal costs on a punitive scale.

   4.3 The rental agreement is a lease. Wherefore the rental agreement constitutes a credit agreement for the purposes of the [National Credit Act 34 of 2005] as contemplated in section 8(1)(b)(3)(a) and (b) and 4(e) read with section 4 of the [National Credit Act 34 of 2005].

   4.4 [The] particulars of claim lacks an averment that at the time the agreement was made, Sasfin was registered under [the National Credit Act 34 of 2005] as a credit provider, wherefore the rental agreement, on the pleading, falls to be declared void as from the date the agreement was entered into as contemplated in section 89(2)(d) read with section 89(5)(a) of the [National Credit Act 34 of 2005].

[MR SLABBERT'S] THIRD EXCEPTION

5. [The] particulars of claim asserting Sasfin's claim in the alternative to that of SASP, renders SASP's claim bad in law, in that SASP, the cessionary in the out-and-out cession, cannot sue in the name of Sasfin, the cedent in an out-and-out cession.

[MR SLABBERT'S] FOURTH EXCEPTION

6. On [the] particulars of claim, as pleaded, the agreement is a credit agreement.

7. The credit agreement is reckless, in that:-

   7.1 [the] particulars of claim lacks averments that at the time that the agreement was made, Sasfin conducted an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; and

   7.2 [the] particulars of claim lacks an averment that the rental agreement is not a reckless credit agreement.

8. Wherefore the credit agreement is void *ab initio*, alternatively, falls to be declared void."

[8] I now deal with each of the four grounds of exception separately.

First ground of exception: Sasfin lacks *locus standi* in the action

[9] It is alleged at paragraph 4 of the particulars of claim that Sasfin concluded the rental agreement with Mr Slabbert. According to paragraphs 12 to 17 of the particulars of claim, SASP acquired all the rights, title and interest in the rental agreement from Sasfin through cession (**"the cession"**).

[10] Mr Slabbert pleads at paragraph 3.2 of the notice of exception that the cession divested Sasfin of its rights against him. He further pleads at paragraph 3.3 of the notice of

exception that the cession destroyed Sasfin's *locus standi* in the action. It was argued on behalf of Mr Slabbert at the hearing of the exception that the cession created a factual impossibility. According to the argument, the cession made it factually impossible for Sasfin to claim against Mr Slabbert. Counsel for Mr Slabbert argued that Sasfin should have pleaded at paragraph 25 of the particulars of claim that it will rely on the facts pleaded in the particulars of claim, except those relating to the cession.

[11] In considering Mr Slabbert's contentions on his first ground of exception, one must have regard to paragraphs 24 and 25 of the particulars of claim. It is clear that SASP and Sasfin claim in the alternative. It is specifically pleaded at paragraph 25 of the particulars of claim that the claim by Sasfin against Mr Slabbert is in the alternative to the claim by SASP against Mr Slabbert *"in the event that the allegations regarding the cession between Sasfin and SASP … are not proved."*

[12] More than one plaintiff may institute an action against a defendant in the alternative as contemplated in rule 10(1):

> "Any number of persons, each of whom has a claim … in the alternative, may join as plaintiffs in one action against the same defendant … against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."

[13] It is clear that rule 10(1) provides for the type of situation faced by SASP and Sasfin. Their alternative claims are both against Mr Slabbert. If SASP and Sasfin had to institute separate actions against Mr Slabbert, their right to relief would depend upon the determination of substantially the same question of law or fact.

[14] With reference to what is pleaded at paragraph 25 of the particulars of claim, the joinder in the action by SASP and Sasfin is expressly provided for in rule 10(1) as *"a joinder conditionally upon the claim of any other plaintiff failing."* It was held in *Sackstein and Others NNO v Du Preez* 2004 (2) SA 459 (SECLD) at 462C–D that –

> "[r]ule 10(1) of the Uniform Rules of Court permits any number of persons to sue the same defendant in the alternative provided that substantially the same question of fact or law would arise in respect of the claim of each of the plaintiffs. The Rule contemplates a joinder of a plaintiff who has a claim which is conditional on the failure of the claim of a co-plaintiff. (See *Kinekor Films (Pty) Ltd v Drive-In Home Movies* 1976 (2) SA 87 (O) at 94B.)"

[15] In my view, the claim by Sasfin against Mr Slabbert is clearly dependent upon the failure of the claim by SASP against Mr Slabbert. It is apparent from the particulars of claim that the requirements of rule 10(1) have been met. It remains to be determined at the trial in

the action whether or not the allegations regarding the cession are proved. Having heard all the evidence, the trial court's findings on the cession will determine whether or not Sasfin has been divested of its rights against Mr Slabbert and whether or not Sasfin has *locus standi* in the action. In the result, Mr Slabbert's first ground of exception is dismissed.

Second ground of exception: The provisions of the National Credit Act 34 of 2005 apply to the rental agreement and Mr Slabbert

[16] It is alleged at paragraph 23 of the particulars of claim that the provisions of the National Credit Act 34 of 2005 (**"the National Credit Act"**) are not applicable to the rental agreement and/or Mr Slabbert. Mr Slabbert pleads in the notice of exception that this allegation is bad in law in that –

> "4.1 The equipment rented to [Mr Slabbert], is movable.
>
> 4.2 In terms of the rental agreement Sasfin undertook to supply the equipment, deferred [Mr Slabbert's] obligation to pay in terms of the agreement, charged interest in respect of the deferred amounts and the amounts not paid within the time provided for in the agreement, and in the event of non-payment Sasfin would be entitled to legal costs on a punitive scale.
>
> 4.3 The rental agreement is a lease. Wherefore the rental agreement constitutes a credit agreement for the purposes of [the National Credit Act] as contemplated in section 8(1)(b)(3)(a) and (b) and (4)(e) read with section 4 of [the National Credit Act].
>
> 4.4 [The] particulars of claim lacks an averment that at the time the agreement was made, Sasfin was registered under [the National Credit Act] as a credit provider, wherefore the rental agreement, on the pleading, falls to be declared void as from the date the agreement was entered into as contemplated in section 89(2)(d) read with section 89(5)(a) of the [National Credit Act]."

[17] At the hearing of the exception, counsel for Mr Slabbert referred me to clause 5 of the rental agreement. He argued that this clause is unlawful as contemplated in section 90(2)(*o*) of the National Credit Act. This complaint is not stated in the grounds upon which the exception is founded. It was held by the Supreme Court of Appeal in *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at paragraph [7] that *"[a]n excipient is obliged to confine his complaint to the stated grounds of his exception."* Since the alleged unlawfulness of clause 5 of the rental agreement is not stated in the notice of exception, the exception cannot be decided on this ground. It is clear from rule 23(3) that, when he took the exception, the grounds upon which the exception is founded had to be clearly stated by Mr Slabbert. The peremptory nature of this requirement is apparent from the use of the word "shall". Had Mr Slabbert intended to found the exception on the ground of the alleged unlawfulness of clause 5 of the rental agreement, he should have clearly stated such ground in the notice of exception.

In his commentary on rule 23(3), D.E. van Loggerenberg states[1] that an excipient is bound to the grounds of exception set out in his notice of exception, and will not be permitted at the hearing of the exception to rely on different grounds or to raise a different exception. The rationale for this approach is clear from what Heher J, as he then was, held in this Division in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (WLD) at 898E–899B:

> "An exception is a pleading: *Haarhoff v Wakefield* 1955 (2) SA 425 (E). A defendant is free to frame his exception in any way he chooses, but is bound by the way in which his case is made out in the exception. Jacob and Goldrein on *Pleadings: Principles and Practice* at 8–9 put it thus:
>
> > 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'any other business' in the sense that points other than those specified in the pleadings may be raised without notice.'
>
> I agree with counsel for the plaintiff that these general statements apply to an exception. A party is bound by the terms in which it is framed and by the issues which it raises. Erasmus *Superior Court Practice* B1–163. *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373 provides examples of a refusal to entertain a contention not covered by grounds of exception. See also *Jack Smith v Joe's (Pty) Ltd* 1929 TPD 323 and 327."

[18] I asked counsel for Mr Slabbert at the hearing of the exception to address me on the impact of the judgment by the Supreme Court of Appeal in *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC and Another* 2013 (3) SA 426 (SCA) on Mr Slabbert's contention that the rental agreement constitutes a credit agreement for purposes of the National Credit Act. Counsel again referred me to clause 5 of the rental agreement and argued that the present case is distinguishable from *Michael's Bid a House CC* on the basis that the rental agreement is not a credit transaction as contemplated in section 8(4) of the National Credit Act but a credit facility as contemplated in section 8(3) of the National Credit Act. I accept, for purposes of this judgment, that the reference at paragraph 4.3 of the notice of exception to *"section 8(1)(b)(3)(a) and (b)"* includes a reference to section 8(3) of the National Credit Act.

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[1] 2015. Erasmus *Superior Court Practice*. Claremont: Juta and Company (Pty) Ltd. Volume 2, D1-310 [Service 11,2019].

[19] Clause 5 of the rental agreement provides:

> "You and we both agree that the amount of the rentals will increase from time to time in accordance with increases in the prime overdraft rate as charged by The Standard Bank of South Africa Limited to its most favored customers ('prime'). In addition, you agree that the prevailing rental will increase once per year on the anniversary of the contract start date by the annual escalation percentage stated in the Schedule, cumulatively."

[20] Section 8(3) of the National Credit Act provides as follows:

> "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(*b*), constitutes a credit facility if, in terms of that agreement –
>
> (*a*) a credit provider undertakes –
>
> (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
>
> (ii) either to –
>
> (*aa*) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
>
> (*bb*) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
>
> (*b*) any charge, fee or interest is payable to the credit provider in respect of –
>
> (i) any amount deferred as contemplated in paragraph (*a*)(ii)(*aa*); or
>
> (ii) any amount billed as contemplated in paragraph (*a*)(ii)(*bb*) and not paid within the time provided in the agreement."

[21] Counsel appearing for Mr Slabbert argued that the rental agreement constitutes a credit facility because Mr Slabbert's obligation to pay in terms thereof is deferred as contemplated in section 8(3)(*a*)(ii)(*aa*) of the National Credit Act. There is no merit in this argument. Clause 11 of the rental agreement expressly provides that Mr Slabbert agreed to pay all rentals monthly in advance.

[22] It was also argued on behalf of Mr Slabbert that the references at clause 5 of the rental agreement to *"the prime overdraft rate as charged by The Standard Bank of South Africa Limited to its most favored customers ('prime')"* and *"the annual escalation percentage stated in the Schedule"* prove that interest is payable by Mr Slabbert as contemplated in section 8(3)(*b*) of the National Credit Act. This argument is without merit. Clause 5 of the rental agreement clearly deals with how increases in the amounts of rentals are to be calculated. It does not deal with interest payable by Mr Slabbert as contemplated in section 8(3)(*b*) of the National Credit Act.

[23] The rental agreement is not a credit facility. It does not comply with the requirements of sections 8(3)(*a*)(ii)(*aa*) and 8(3)(*a*)(ii)(*bb*) of the National Credit Act. The rental agreement

does not comply with the requirements of section 8(3)(*a*)(ii)(*aa*) of the National Credit Act because, as stated, clause 11 of the rental agreement expressly provides that Mr Slabbert agreed to pay all rentals monthly in advance. The rental agreement also does not comply with the requirements of section 8(3)(*a*)(ii)(*bb*) of the National Credit Act because, in terms of clause 11, it is not necessary that a monthly statement or invoice be sent to Mr Slabbert. Thus, there is no undertaking that Mr Slabbert will be billed periodically as contemplated in section 8(3)(*a*)(ii)(*bb*) of the National Credit Act.

[24] There are no allegations in the particulars of claim that could bring the rental agreement within the scope of the requirements of a credit facility as contemplated in sections 8(3)(*a*)(ii)(*aa*) and 8(3)(*a*)(ii)(*bb*) of the National Credit Act. It is not alleged in the particulars of claim that there is an undertaking to defer Mr Slabbert's obligation to pay as contemplated in section 8(3)(*a*)(ii)(*aa*) of the National Credit Act. It is not alleged in the particulars of claim that there is an undertaking to bill Mr Slabbert periodically as contemplated in section 8(3)(*a*)(ii)(*bb*) of the National Credit Act. The Constitutional Court held in *Baliso v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at paragraph [33] that *"[w]here an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it."* On the particulars of claim as it stands, the rental agreement does not comply with the requirements of sections 8(3)(*a*)(ii)(*aa*) and 8(3)(*a*)(ii)(*bb*) of the National Credit Act. As a result, on the particulars of claim as it stands, the rental agreement is not a credit facility as contemplated in section 8(3) of the National Credit Act.

[25] Mr Slabbert pleaded at paragraph 4.3 of the notice of exception that the rental agreement constitutes a credit agreement as contemplated in section 8(4)(*e*) of the National Credit Act. However, counsel for Mr Slabbert did not pursue this point at the hearing of the exception. As stated, it was argued instead that the rental agreement constitutes a credit facility as contemplated in section 8(3) of the National Credit Act. To the extent that it might be necessary, I find that the rental agreement does not constitute a credit transaction as contemplated in section 8(4)(*e*) of the National Credit Act. The Supreme Court of Appeal held as follows in *Michael's Bid a House CC* at paragraphs [13] and [14]:

> "[13] Section 8 of the [National Credit Act] determines which contracts constitute credit agreements. Subsection 8(4) provides:
>
> '(4) An agreement, *irrespective of its form* but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –
>
> *(a)* a pawn transaction or discount transaction;
>
> *(b)* an incidental credit agreement, subject to section 5(2);
>
> *(c)* an instalment agreement;

> *(d)* a mortgage agreement or secured loan;
>
> *(e)* *a lease;* or
>
> *(f)* any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
>
> (i) the agreement; or
>
> (ii) the amount that has been deferred.' [My emphasis.]

[14] The principal argument for the respondents in so far as the agreement in dispute in this matter was concerned was that the 'rental agreement' between the parties was a lease. Indeed rental agreements generally are leases. But a lease as defined in the [National Credit Act] is the very antithesis of a lease.

The definition (in s 1) reads:

> '"**lease**" means an agreement in terms of which –
>
> (*a*) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
>
> (*b*) payment for the possession or use of that property is –
>
> (i) made on an agreed or determined periodic basis during the life of the agreement; or
>
> (ii) deferred in whole or in part for any period during the life of the agreement;
>
> (*c*) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
>
> (*d*) *at the end of the term of the agreement, ownership of that property either –*
>
> (i) *passes to the consumer absolutely; or*
>
> (ii) *passes to the consumer upon satisfaction of specific conditions set out in the agreement; . . .'* [My emphasis.]
>
> A true lease, one that obliges the lessee to return the thing hired at the end of the contract, is thus not covered by the definition of a credit agreement and the relationship between the lessor and the lessee is not, if one has regard only to this definition, governed by the provisions of the [National Credit Act]."

[26] Having found that the rental agreement does not constitute a credit facility as contemplated in section 8(3) of the National Credit Act or a credit transaction as contemplated in section 8(4)(*e*) of the National Credit Act, I find that it was not necessary for Sasfin to have alleged in the particulars of claim that it was registered as a credit provider under the National Credit Act.

[27] In the result, Mr Slabbert's second ground of exception is dismissed.

Third ground of exception: SASP cannot sue in the name of Sasfin

[28] It is pleaded at paragraph 24 of the particulars of claim that SASP claims judgment against Mr Slabbert. This is followed by paragraph 25 of the particulars of claim in which it is pleaded that Sasfin claims judgment against Mr Slabbert in the alternative to the claim by SASP *"in the event that the allegations regarding the cession between Sasfin and SASP … are not proved."*

[29] Mr Slabbert pleads in the notice of exception that the *"particulars of claim asserting Sasfin's claim in the alternative to that of SASP, renders SASP's claim bad in law, in that SASP, the cessionary in the out-and-out cession, cannot sue in the name of Sasfin, the cedent in an out-and-out cession."*

[30] This ground of exception falls to be dismissed. First, SASP does not *"sue in the name of Sasfin"*. SASP is cited as the First Plaintiff in the action in its own name. Second, it is clear from what is pleaded at paragraphs 24 and 25 of the particulars of claim that SASP and Sasfin claim in the alternative. With reference to what is stated above, rule 10(1) provides for the type of situation faced by SASP and Sasfin. The joinder in the action by SASP and Sasfin is expressly provided for in rule 10(1) as *"a joinder conditionally upon the claim of any other plaintiff failing."*

Fourth ground of exception: The rental agreement is a credit agreement

[31] Mr Slabbert pleads at paragraph 6 of the notice of exception that *"[o]n [the particulars of claim], as pleaded, the [rental] agreement is a credit agreement."* This is followed at paragraphs 7, 7.1 and 7.2 of the notice of exception by allegations that *"[t]he credit agreement is reckless in that"* the *"particulars of claim lacks averments that at the time that the agreement was made, Sasfin conducted an assessment as required by section 81(12)"* and *"that the rental agreement is not a reckless credit agreement."*

[32] I have already found that the rental agreement does not constitute a credit facility as contemplated in section 8(3) of the National Credit Act or a credit transaction as contemplated in section 8(4)(*e*) of the National Credit Act. As such, I find that it was not necessary for Sasfin to have conducted an assessment as contemplated in section 81(2) of the National Credit Act or for SASP and Sasfin to have alleged in the particulars of claim that the rental agreement is not a reckless credit agreement. In the result, Mr Slabbert's fourth ground of exception is dismissed.

Costs

[33] Counsel appearing for SASP and Sasfin argued that the exception should be dismissed and that Mr Slabbert should be ordered to pay SASP's and Sasfin's costs on the scale as between attorney and own client. Counsel appearing for Mr Slabbert conceded during argument that the rental agreement provides for this scale of costs to be awarded against his client should the exception be dismissed.

[34] Clause 7 of the rental agreement provides as follows in relevant part:

> "7. If you breach any of the conditions or terms of the Agreement, or fail to pay any amounts due to us ... then you agree that we have the right (without notice to you and without affecting any of our other rights) to:
>
> 7.1 claim immediate payment of all amounts which would have been payable in terms of the Agreement until expiry of the rental period stated in the Schedule, whether such amounts are then due for payment or not. ... ; or
>
> 7.2 immediately terminate the Agreement, recover possession of the goods, retain all amounts already paid by you and claim all outstanding rentals, all legal costs as between attorney and his own client and the Net Present Value at Prime of the rentals which would have been payable had the Agreement continued until expiry of the initial rental period stated in the Schedule as a pre-estimate of the damages which we may suffer."

[35] The following is alleged at paragraphs 18 and 19 of the particulars of claim:

> "18. [Mr Slabbert] breached the terms and conditions of the rental agreement in that he failed to maintain regular monthly payments.
>
> 19. The failure to continue to have maintained the monthly agreed upon instalments constituted a breach of the rental agreement which breach entitled SASP to claim immediate payment of all amounts which would have been payable in terms of the rental agreement until expiry of the rental period stated in the in the schedule, whether such amounts are then due for payment or not."

[36] It is clear from what is pleaded at paragraphs 18 and 19 of the particulars of claim that the claim against Mr Slabbert is premised on the provisions of clause 7.1 of the rental agreement as opposed to clause 7.2 thereof. Clause 7.1 of the rental agreement does not contain a provision regarding legal costs similar to that contained in clause 7.2 of the rental agreement, namely that all legal costs as between attorney and his own client may be claimed from Mr Slabbert. In the result, I am in respectful disagreement with counsel on the issue of costs. I find no justification for an order that Mr Slabbert should pay the costs of SASP and Sasfin on the scale as between attorney and own client.

Order

[37] In the result the following order is made:

1. The exception is dismissed.

2. The Excipient shall pay the Respondents' costs on the party and party scale.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Date heard:	1 September 2021
Judgment delivered:	22 September 2021
For the Excipient / Defendant:	P. Sieberhagen briefed by Vardakos Attorneys
For the Respondents / Plaintiffs:	S. Aucamp briefed by Smit Jones & Pratt